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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 663

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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IN THE

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OCTOBER TERM, 1959.

NO. . . .

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its judgment dated and entered October 29, 1959 (App. 1). That judgment denied the issuance of a writ of mandamus to command respondent, *inter alia*, to vacate an order of transfer entered by him pursuant to 28 U. S. C., sec 1404 (a), which Order was procured by an extrinsic fraud on the Court.

OPINIONS BELOW

No opinion was delivered in the District Court; and that Court's Orders (App. 2-4) are not reported.

No opinion was delivered in the Court of Appeals; and that Court's Judgment (App. 1) is not reported.

JURISDICTION

The judgment sought to be reviewed (App. 1) is dated and entered October 29, 1959. Therefore, this petition for writ of certiorari may be filed on or before January 27, 1960. This Court has jurisdiction to review that judgment by certiorari under 28 U. S. C., sec. 1254(1).

QUESTIONS PRESENTED

1. Do not misrepresentations constitute an extrinsic fraud on the Court, which procure a District Court Order granting a Motion for Change of Venue under 28 U.S.C., sec. 1404(a) to another District (where the cause could not have been brought), being deliberate, intentional, deceitful, false and misleading misrepresentations that the movant has "three other witnesses" in the transferee District who can and will testify in support of the Complaint?

2. Does not an extrinsic fraud on the Court, which is the inducing reason for entry of an Order transferring the cause, render such Order of Court void and all proceedings subsequent and pursuant thereto a nullity?

3. Does not the transferor Court, upon which an extrinsic fraud is perpetrated, have inherent jurisdic-

tion to cleanse the fraud, as well as actual jurisdiction upon the cause's proper re-docketing in said transferor Court at a Miscellaneous number on the issue of the fraud?

4. Does not a Judgment entered in the Third Circuit, denying issuance of a writ of mandamus to command a District Court Judge to vacate an Order of his Court procured by an extrinsic fraud on the Court, conflict with decisions in that and other Circuits as well as with the Law of the Land?

STATEMENT OF THE CASE

On September 18, 1959, Hon. Wallace S. Gourley, respondent, entered a Memorandum Order (App. 2) refusing a Petition of Paul Ginsburg, petitioner, for vacating and setting aside respondent's prior Order of Court entered May 29, 1957, procured through extrinsic fraud on the Court, by which an interpleader action was transferred under 28 U.S.C., sec. 1404(a), to the District of Arizona at Phoenix. The respondent entered that Order because he thought he was "without jurisdiction to entertain" (App. 3) the petition. Later the same day, respondent, after hearing arguments, entered another Order refusing a Petition for Rehearing (App. 4) "for the reason this Court has no jurisdiction".[1]

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1. The interpleader proceeding was filed in the District Court for the Western District of Pennsylvania as Civil Action No. 11521. It involved the proceeds of policies of insurance on the life of Samuel A. Ginsburg, deceased, brother of petitioner, who died on April 7, 1953. The decedent-insured in 1952 had voluntarily signed endorsements to his policies on forms supplied by The Mutual Life Insurance Company of New York at

When Chief District Judge Gourley entered those Orders (App. 2, 4), the cause was before him at Miscellaneous No. 2854 in his Court, wherein it had been redocketed in connection with the taking of depositions to establish the extrinsic fraud on his Court by which he had on May 29, 1957, entered an Order transferring the cause to Phoenix, Arizona. In the Arizona District, the interpleader action was docketed as No. Civ. 2664 Phx.

In order to induce the Pennsylvania District Court to order an unlawful transfer of the cause to the Arizona

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its Phoenix office whereby your petitioner became the absolute owner, sole beneficiary, premium payor and possessor of said policies at Pittsburgh, Pennsylvania, where he is a life long resident, like his deceased brother was. The interpleader was instigated by the decedent-insured's ex-wife, Betty K. Ginsburg (now Hilsdorf), and her Phoenix divorce Attorney, Samuel Langerman, who filed suit in the District Court at Phoenix (No. Civ. 1882-Phx.) against the insurer and your petitioner, claiming creation of an oral trust "at the time" of the transfer of the policies to your petitioner, for two minors. Subsequently, to wit, on March 31, 1958, on motion of your petitioner through his Counsel, Paul W. La Prade, Esquire, District Judge Dave W. Ling ordered that action dismissed as to defendant, Paul Ginsburg, on "the ground that said defendant, Paul Ginsburg, was and is a resident of the State of Pennsylvania and has not been duly served with process in this action. The Court therefore has no jurisdiction over his person." In the meantime, after the institution of that Phoenix action your petitioner filed suit in the District Court for the Southern District of New York at Civil Action No. 85-33 against the insurer for the proceeds of his contracts. Your petitioner contended before and after the interpleader that it was unauthorized and unlawful because according to both claims of record the insurer would have been relieved of all liability by making payment to Paul Ginsburg, individually and/or as Trustee.

District where your petitioner would unconstitutionally and illegally be deprived of his insurance contracts and other property, as well as his right to defend them in the District where he resides, misrepresentations were made to the District Court which were deliberate, intentional, deceitful, false and misleading. Said fraudulent misrepresentations were made in affidavits by the Phoenix guardian ad litem, Betty K. Ginsburg—Hilsdorf, her Phoenix divorce attorney, Samuel Langerman, and her Pittsburgh cousin and attorney, Eugene B. Strassburger, who appeared for her in the District Court associating with him Attorney Eugene B. Strassburger, Jr., his son. Said fraudulent misrepresentations were made unwittingly through Loyal H. Gregg, Esquire, Court-appointed guardian ad litem; and knowingly through Attorney Eugene B. Strassburger, in open court.

The fraud on the Court consisted, *inter alia*, of misrepresenting that in addition to Betty K. Ginsburg-Hilsdorf, mother of the two minors (now aged 20 and 17 years) and Attorney Samuel Langerman (who admitted that he signed and verified the Phoenix Complaint on a contingent fee basis), they had "three other witnesses" at Phoenix who could and would testify in support of the Complaint. Those three "witnesses" were represented to be Harry Rosenzweig, a jeweler, Al Overend, an orchestra leader; and Mrs. Mildred Frantz, a housewife.

Your petitioner knew that those misrepresentations were false when made, and that none of those five "witnesses" could possibly produce any evidence, admissible or inadmissible, that could establish the alleged oral trust; however, he was not permitted by the Court

and unable at any rate to expose their fraud prior to trial.

Furthermore, to create an inducing psychological atmosphere for procuring the wrongful, fraudulent transfer of the cause, the said misrepresenters convinced the Court that your petitioner is the rich uncle of the poor minors. Again the misrepresenters, Mrs. Hilsdorf, Attorney Langerman and Attorney Strassburger knew that the minors and their mother are not poor; and, on the contrary, had and have knowledge of Trust Funds in Pittsburgh alone wherein the life interest of the mother and the contingent interests of said minors is very substantial. As a matter of fact, there was no denial at the "trial" in Phoenix, that the minors' contingent interests in said Trust Funds exceeded one quarter of a million dollars. Also, they knew that Mrs. Hilsdorf's income, at and since the time of said financial misrepresentation, has been adequately and completely the sole support of herself, her second husband, Thomas J. Hilsdorf (until divorced), and the two minor children.

The District Court being thus unduly and fraudulently influenced and persuaded to transfer the cause, the first Order of transfer was entered by Hon. Rabe F. Marsh, Jr. That Order was subjected to further proceedings, including an appeal to the Court of Appeals at No. 11,571, which was ordered dismissed on motion for want of an appealable Order. That decision was, in turn, the subject of a Petition for Writ of Certiorari in this Honorable Court at No. 929 October Term, 1955, wherein certiorari was denied. Then the issues before the Court were wrongful, erroneous transfer because the interpleader action is an *in rem* proceeding not sub-

ject to transfer under 1404(a) or otherwise; and because the transfer was to a District where the action could not have been brought against petitioner.

The proceedings and appendices in this Court at No. 929 October Term, 1955, are incorporated herein by reference thereto; wherein District Judge Marsh's Opinion dated June 11, 1954, pertaining to the Motion to Transfer is printed at pages 19a-22a and his Order of transfer is printed at pages 26a-27a. Said District Judge's Opinion shows how deeply influenced he was by the fraudulent misrepresentation about the financial condition of the minors and their mother-guardian ad litem; and that the inducing reason for the transfer was the convenience of the "three other witnesses", the Judge stating, "Furthermore, even if the cost of transporting the witnesses could be provided, it would nevertheless place a considerable burden upon the witnesses if they would be required to leave their businesses and personal affairs and travel to Pittsburgh for the trial. It is conceivable that a witness, whose testimony would consume half a court day, might be required to spend much more time away from his home if the case were tried in Pittsburgh, whereas the same witness would be available for call upon a few hours' notice if the case were tried in Phoenix". This Opinion shows the undue concern of the District Court for a jeweler, an orchestra leader, and a housewife whose time alone is involved; as against your petitioner whose personal and professional property rights are involved and who is as actively engaged in the practice of law as any other lawyer; and his witnesses, who are so important in professional, social and business circles that he would not presume to request them to travel cross-country to assist

him in defending even a shake-down, like the instant litigation.

Now that it has been made manifest how seriously impressed with the "grounds" for transfer, was the District Court Judge who stated from the bench that he did not see how the oral trust could possibly be established, it should be pointed out that although the "three other witnesses" were all available the day of the "trial" in Phoenix, the guardian ad litem called only two— Mr. Harry Rosenzweig and Mrs. Mildred Frantz, each of whom testified for only a few minutes, and both of whom not only failed to offer any testimony in support of the Complaint but also actually disestablished the Complaint. The pertinent portions of their testimony (consented and agreed to be a true copy from the Official Court Reporter's Transcript by counsel for the guardian ad litem below) is contained in paragraph 11 of the Petition for Writ of Mandamus (pp. 4-7) filed in the Court of Appeals. *Incredible as it may seem, all that they testified to was that the decedent-insured had told them that if anything should happen to him, his children were well provided for; but they added that he had not made any mention of life insurance policies.* Assuming *arguendo* that those statements were made by the decedent-insured, he could not possibly having been referring to the less than $30,000.00 of insurance involved herein, but rather to substantial funds like the large trust funds hereinabove referred to established for the benefit of the minors. At any rate, it is elementary that oral trusts are not created that way.

After the denial of certiorari at No. 929 October Term, 1955, there were other proceedings in the Dis-

trict Court before Chief District Judge Gourley, respondent, in the course of which he entered the second Order of Transfer dated May 29, 1957.

Arizona District Judge Dave W. Ling refused to re-transfer the cause prior to trial; and when the cause came on to be heard before Judge Ling, the fraud on the Pennsylvania District Court was first exposed. Your petitioner through his counsel, Hess Seaman of Beer, Seaman & Polley, subsequently moved the Arizona District Court to re-transfer the cause, because it had never acquired jurisdiction; but the motion was refused. Prior to said refusal, the case had been re-docketed in the Pennsylvania District for the taking of depositions on oral examination of Lloyd H. Gregg, Esquire, and Eugene B. Strassburger, Esquire, in connection with the fraud on the Court. The day after Arizona District Judge Ling refused to cleanse the fraud and, on the contrary, condoned it, he hastened to sign and enter the Findings of Fact, Conclusions of Law, and Judgment submitted to him for the guardian ad litem now on appeal in the Ninth Circuit. The adjectives used by prominent members of the Bar from coast to coast to describe Judge Ling's actions include "monstrous", "incredible", and "sickening". Promptly thereafter Judge Ling entered an Order to block the taking of the noticed depositions. Accordingly, your petitioner presented a Petition to respondent Judge Gourley directly, to cleanse the fraud upon his Court and vacate his Order of transfer. Although Attorney Eugene B. Strassburger sent an associate to obstruct the proceedings, Attorney Gregg appeared as an Officer of the Court to testify forthrightly that in presenting the Motion for Change of Venue he relied solely upon information received from

Attorney Strassburger and the affidavits produced by Attorney Strassburger; indicating that had he known the truth about the three other "witnesses", he would not have presented the motion.

The same fraud which was perpetrated upon the District Court also soiled the Record in the Court of Appeals at No. 11,571, and did likewise in this Honorable Court at No. 929 October Term, 1955. Nor has the issue of fraud been yet adjudicated, because Arizona District Judge Ling ignored it; respondent Judge Gourley thought that he was without jurisdiction to adjudicate it; and the Court of Appeals deemed it unnecessary to pass upon it.

On October 29, 1959, the Court of Appeals through an Order at No. 13046 signed by Chief Judge Biggs (also present: Circuit Judges McLaughlin and Staley) summarily denied the Petition for Writ of Mandamus. The instant petition seeks a review of that decision.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

A Fraud Upon the Court Was Perpetrated.

It is apparent from the record that all of the elements of extrinsic fraud on the Court are present herein. The fraudulent allegations and misrepresentations knowingly made by Mrs. Hilsdorf, Attorney Langerman and Attorney Strassburger that there were three other witnesses in Phoenix who could and would testify in support of the Complaint were false, misleading, deliberate, intentional, and deceitful; depriving petitioner of his right to defend them, and of his right to defend the Complaint in the District where he resides, to his great damage; and soiling the Court records.[2]

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2. Black's Law Dictionary, Fourth Edition (pp. 788-9), defines fraud as "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Brainerd Dispatch Newspaper Co. v. Crow Wing County, 196 Minn. 194, 264 N.W. 779, 780. Any kind of artifice employed by one person to deceive another. Goldstein v. Equitable Life Assur. Soc. of U.S., 160 Misc. 364, 289 N.Y.S. 1064, 1067 . . . It consists of some deceitful pratcice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Maher v. Hibernia Ins. Co., 67 N.Y. 292; Alexander v. Church, 53 Conn. 561, 4A. 103; Studer v. Blei-

The testimony of the two of the three "witnesses" called, and the failure to call the third "witness", fully support this point.

II.

The Extrinsic Fraud on the Court Rendered the Order of Transfer Void and All Proceedings Pursuant Thereto a Nullity.

It is elementary that an Order of Court procured through fraud is null and void, of no legal force or effect; and it necessarily follows that all subsequent proceedings pursuant thereto are a nullity.[3]

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stein, 115 N.Y. 316, 22 N.E. 243, 7 L.R.A. 702; McNair v. Southern States Finance Co., 191 N.C. 710, 133 S.E. 85, 88. It comprises all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another, Coppo v. Coppo, 163 Misc. 249, 297 N.Y.S. 744, 750. . . . Extrinsic or collateral fraud justifying equitable relief against a judgment or decree means some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. Farley v. Davis, 10 Wash. 2d 62, 116 P.2d 263, 268."

3. Black's Law Dictionary, Fourth Edition (pp. 1745-6), defines a void judgment as "one which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Reynolds v. Volunteer State Life Ins. Co., Tex. Civ. App., 80 S.W.2d 1087, 1092. One which, from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever; and incapable of confirmation, ratification, or enforcement in any manner or to any degree .Ex parte Myers, 121 Neb. 56, 236

Reasons Relied on for Allowance of Writ.

This Honorable Court has repeatedly declared that it is charged with supervisory powers and functions through which it hastens to set aside void judgments. In the case of *United States v. Shotwell Mfg. Co., et al.*, 355 U. S. 233, Mr. Justice Harlan who delivered the Opinion of the Court, relied on two other cases (pp. 241-2), which likewise involved a "challenge to the integrity of the record based on newly discovered evidence": *Communist Party v. Control Board,* 351 U. S. 115, and *Mesarosh v. United States,* 352 U. S. 1. In Communist Party, *supra,* the Court stated (pp. 124-5) that: "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. . . . We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it." In *Mesarosh, supra,* the Court stated (p. 14) that, "This is a federal

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N.W. 143, 144. One that has merely semblance without some essential elements, as want of jurisdiction or failure to serve process or have party in court. Wellons v. Lassiter, 200 N.C. 474, 157 S.E. 434, 436. It is subject to collateral attack. Owens v. Cocroft, 14 Ga. App. 322, 80 S.E. 906, 907."

criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. (Citing McNabb, *supra,* in a footnote.) If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

III.

The Transferor Court Had Both Inherent and Actual Jurisdiction to Cleanse the Fraud and Vacate Its Order.

It is elementary that a Court has inherent power to vacate its own judgments for fraud. Authority for this point in the instant Circuit is found in *Root Refining Co. v. Universal Oil Products Co.; American Safety Table Co. v. Singer Sewing Machine Co.,* 169 F. 2d 514, certiorari denied, 335 U. S. 912, rehearing denied, 336 U. S. 915. Therein it was held that where a controversy is terminated by judgment, the judgment's freedom from fraud is subject to further judicial inquiry, and the general rule that Courts do not set aside their judgments after the term at which they were rendered is inapplicable, notwithstanding that the injured party may have been derelict in bringing the fraud to the Court's attention. Furthermore, the District Court can vacate its own judgment, and failing to do so the Court of Appeals should.

In *Griffin v. Griffin,* 327 U. S. 220, rehearing denied 328 U. S. 876, it was held that a judgment may be vacated in the state of its rendition on the ground that it was procured by fraud.

Reasons Relied on for Allowance of Writ.

In 92 C. J. S., sec. 145, p. 863, authorities are cited for the proposition that "in granting or denying a change of venue on the ground of the convenience of witnesses, the Court will not consider the convenience of witnesses whose testimony will be immaterial, incompetent, inadmissible, unnecessary or cumulative".

Where a change of venue was ordered by a court upon an affidavit which was of no effect because not within the statute providing for change of venue, the court did not lose jurisdiction of the cause so as to prevent it making a later order directing the return of all the pleadings, papers, etc. *State, ex rel. Neal v. Superior Court of Marion County, et al.,* 202 Ind. 456, 174 N. E. 732.

Neither finality and appealability of an order changing venue nor requirement that court to which transfer is made should thereafter exercise jurisdiction precludes the court making the order from considering a motion to vacate such order on some recognized ground and according to recognized procedure. West's Ann. Code Civ. Proc., secs. 399, 963, subd. 2. (Badella v. Miller, 279 P. 2d 729.)

A judgment which is absolutely void may be collaterally attacked, or it may be directly challenged but then only in the Court by which it was rendered. *Prudential Ins. Co. v. Zimmerer, et al.,* 66 F. Supp. 492, 500.

It is obvious from the foregoing authorities that the respondent, Hon. Wallace S. Gourley, did have jurisdiction and he should have exercised it. *Commonwealth of Massachusetts v. Missouri,* 308 U. S. 1, 19.

Reasons Relied on for Allowance of Writ.

In *American Ins. Co. v. Lucas,* 38 F. Supp. 926 (appeal dismissed 314 U. S. 575), the three-judge Court held that the Court's jurisdiction to reopen its decrees after term was properly invoked in keeping with requirements of "due process of law" by motion for show cause order; that after an order procured by fraud on the Court, the Court had jurisdiction to reopen its decree after term in response to motion for order to show cause, without the institution of an independent bill in equity; that the Court applying the maxim of "clean hands" is concerned primarily with protecting its own integrity from improper action by a party; and it need not even be pleaded and may come to the attention of the court in any way, whereupon the court will act *sua sponte* to vindicate its integrity as a court of justice; and that litigants are as much bound by public policy to protect the integrity of the courts as are the courts themselves.

The case of *Illinois Printing Co. v. Electric Shovel Coal Corp.,* 20 F. Supp. 181, 184, is authority for the point that "Every court has power to control, vacate, or correct its own decrees in the interests of justice. It may do so in the furtherance of justice and its power does not depend upon statute but is inherent. Freeman on Judgments, sec. 200 and 220. Such relief must be granted in the case of fraud, misrepresentation, and mistake."

It is significant that the respondent failed to cite any authority in support of his claim of lack of jurisdiction. The foregoing authorities make it quite manifest that he could not. Under the law, the respondent never lost jurisdiction.

IV.

The Judgment Sought to Be Reviewed Conflicts With Decisions in the Instant and Other Circuits and With Decisions of This Court.

Support for this point is found in the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, wherein this Honorable Court reversed the Court of Appeals for the Third Circuit (137 F. 2d 764), rehearing denied 322 U.S. 772. Mr. Justice Black, who delivered the Opinion of the Court, stated in the opening paragraph, "This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated upon it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate." This Court held (p. 246), "The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought *Hazel* had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, *Hazel* should have been expected to do more than it did to uncover the fraud. But even if *Hazel* did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. . . . Furthermore tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions

in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud". This Court continued (pp. 250-1), "Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though *Hartford's* corruption had been exposed at the original trial. In this situation the doctrine of the Keystone case, *supra,* requires that *Hartford* be denied relief".

It follows that in the instant case the order transferring the cause to Arizona must be vacated and set aside, with the result that the transferee Court never had jurisdiction, all proceedings there are a nullity, the cause must be retransferred to the Western District of Pennsylvania, and thereupon set for trial.

In order to impress this Honorable Court with the inconsistencies and conflicts existing in the lower courts, even in matters involving deception and fraud which Courts normally would be expected to frown upon and hasten to cleanse; your petitioner points out that Chief Judge Biggs, who signed the judgment sought to be reviewed herein, is the same Circuit Judge that delivered the dissenting opinion in *Hartford v. Hazel, supra,* which dissent was upheld by this Court in reversing the Court of Appeals therein. The interesting opening of Circuit Judge Biggs' opinion therein (137 F. 2d 770) is, "I do not believe that this court lacks the power to remedy an apparent fraud perpetrated on it eleven years

ago." . . . "(particularly in view of the fact that this is the court upon which the fraud was perpetrated)".

Now it is obvious why Chief Judge Biggs failed to offer any authority to support his summary denial of the Petition for Writ of Mandamus, sought to be reviewed herein. *There is none.* Chief Judge Biggs' decision in this case reverses his said Opinion in the *Hartford* case, *supra*, and attempts to reverse this Honorable Court.

CONCLUSION

It is apparent from the record facts and the law applicable thereto that your petitioner is entitled to a review of the subject judgment. It is further apparent that even more is involved herein that would forcefully impel this Honorable Court to pierce the judgment sought to be reviewed. Involved is the public policy to protect the integrity of the Courts; and to preserve the integrity of the judicial process. Our highest judicial tribunal will never tolerate even one fraud on the Court, and let it go uncleansed. This Supreme Court will never house a single soiled record and it will issue a pronouncement that fraudulent records cannot remain free of attack with the same full protection to which legal records are entitled.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 13046

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania.

Present: BIGGS, *Chief Judge* and MCLAUGHLIN and STALEY, *Circuit Judges*

Upon consideration of the petition of Paul Ginsburg, Esquire, filed October 5, 1959, praying for an order directed to the Honorable Wallace S. Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, requiring and commanding him to open up and vacate the orders entered by him in that Court on September 18, 1959 at Misc. 2354, and thereupon to open up and vacate the order previously entered by him at Civil Action No. 11521 in that Court on May 29, 1957, which transferred the interpleader proceeding and the balance of the interpleaded fund to the United States District Court for the District of Arizona at Phoenix.

It is ordered that the relief prayed for be and it hereby is denied and that the petition for Writ of Mandamus be and it hereby is denied.

BY THE COURT,

BIGGS
Chief Judge

Dated:
October 29, 1959

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, v. BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, BETTY K. GINSBURG and PAUL GINSBURG.	No. 2354 Miscellaneous

MEMORANDUM ORDER

In this proceeding assigned a miscellaneous number, Paul Ginsburg petitions the court to vacate t' .s Court's Order of May 29, 1957 transferring the action of The Mutual Life Insurance Company of New York, a corporation, v. Bonn Kraus Ginsburg and John Paul Ginsburg, minors, Betty K. Ginsburg and Paul Ginsburg, Civil Action No. 11,521, to the United States District Court at Phoenix, Arizona, after an adjudication has been rendered by the Arizona Court, based upon the allegation that the order of transfer was procured by fraud.

It is contended that the order of transfer was predicated upon representations to an associate member of this Court that such transfer was essential for the convenience of the parties since three identified witnesses who resided in the Arizona District were needed to support the complaint, when in truth and fact at the trial of said proceeding in the Arizona District only two of said witnesses testified and that their testimony did not buttress the complaint as alleged.

This most involved and protracted proceeding has been ruled upon in numerous proceedings before the District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the Supreme Court of the United States. As a consequence of these proceedings, the action was transferred on May 29, 1957 to the United States District Court at Phoenix, Arizona. All papers and the fund have been transferred to said jurisdiction.

It is not my province to evaluate the testimony of witnesses in proceedings in another district before another court when all the records have been transferred to said court and an adjudication has been entered.

I cannot but help conclude that the United States District Court for the Western District of Pennsylvania is without jurisdiction to entertain the instant motion, and any relief to which movant might be entitled must be pursued in the United States District Court at Phoenix, Arizona, and/or the appropriate appellate court.

At time of argument the firm of Strassburger and McKenna, Esqs., presented a prayer for expenses and counsel fees predicated upon Rule 56-G of the Federal Rules of Civil Procedure advancing the thesis that the instant proceedings have been filed in bad faith and for the purpose of delaying the prompt administration of justice. This prayer will be refused.

NOW, THEREFORE, this 18th day of September, 1959, petition of Paul Ginsburg to declare the Order of this Court dated May 29, 1957, pursuant to which said action was transferred to the United States District Court at Phoenix, Arizona, as void, and declare all orders and proceedings in the Arizona District of no effect and

vacate and retransfer said cause from the Arizona Court to this Court, will be, and it hereby is, refused.

FINALLY, IT IS ORDERED that prayer of Strassburger and McKenna, Esqs., for expenses and legal fees will be, and it hereby is, refused.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

ORDER

Re: Petition for Rehearing

AND NOW, this 18th day of September, 1959, Motion for Rehearing of the petition of Paul Ginsburg to vacate the Order of this Court dated May 29, 1957 which transferred Civil Action No. 11521 from this court to the United States District Court for the District of Arizona is refused for the reason this court has no jurisdiction.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

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Office-Supreme Court, U.S.
FILED
APR 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

NO. 663 OCTOBER TERM, 1959

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

MOTION TO VACATE ORDER DENYING CERTIORARI AND FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

IN THE

Supreme Court of the United States

NO. 663 OCTOBER TERM, 1959

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MOTION TO VACATE ORDER DENYING CERTIORARI AND FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully moves this Honorable Court to enter an Order vacating its Order heretofore entered denying his Petition for Writ of Certiorari, and then to grant him leave to file the annexed Amendment to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and thereupon to grant the petition for writ of certiorari as amended; and in support hereof avers:

A. On March 21, 1960, this Honorable Court entered an Order denying the unopposed petition for writ

of certiorari in the above entitled cause; not on the merits, but because petitioner had not exhausted all procedural steps in the lower Courts, which has now been accomplished.

B. On April 6, 1960, the Honorable William J. Brennan, Jr., Associate Justice of this Honorable Court entered on Order extending the time for filing petition for rehearing in the above entitled cause to and including June 14, 1960.

C. The said Order entered by Mr. Justice Brennan was made "upon consideration of the application of petitioner".

D. The application of petitioner included the following:

2. The said petition sought review of a judgment whereby the Court of Appeals for the Third Circuit refused, *inter alia*, to compel the Pennsylvania District Court to assume jurisdiction to cleanse an extrinsic fraud perpetrated upon it, which fraud induced the entry of an Order transferring the cause to the Arizona District. The said cause is now pending in the Court of Appeals for the Ninth Circuit at No. 16,768, on appeal from the Arizona District Court at Phoenix.

3. Since the said denial of certiorari herein, to wit, on March 31, 1960, your petitioner lodged with the Clerk of the Court of Appeals for the Ninth Court for submission to that Court on April 11, 1960, his Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial.

4. The same fraud of record which is involved herein, is likewise included therein. It is averred further that there has not yet been an adjudication on the merits by any court of the issue of fraud.

5. Your petitioner is advised, believes and, therefore, avers that the said denial of certiorari by this Honorable Court was not on the merits, for the reasons set forth in the Conclusion (19) of his petition for writ of certiorari, which is as follows:

> It is apparent from the record facts and the law applicable thereto that your petitioner is entitled to a review of the subject judgment. It is further apparent that even more is involved herein that would forcefully impel this Honorable Court to pierce the judgment sought to be reviewed. Involved is the public policy to protect the integrity of the Courts; and to preserve the integrity of the judicial process. Our highest judicial tribunal will never tolerate even one fraud on the Court, and let it go uncleansed. This Supreme Court will never house a single soiled record and it will issue a pronouncement that fraudulent records cannot remain free of attack with the same full protection to which legal records are entitled.

6. Your petitioner is further advised, believes and, therefore, avers that the said denial of certiorari was based solely upon the procedural proposition that the said motion now pending in the Court of Appeals for the Ninth Circuit was then available to your petitioner, and thus that procedural step must first be exhausted before this Honorable Court will take jurisdiction.

E. On April 11, 1960, the Court of Appeals for the Ninth Circuit entered an Order denying the Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial. A certified copy of said Motion and Order have been lodged herewith in this Honorable Court.

F. The said Motion denied on April 11, 1960, in the Court of Appeals for the Ninth Circuit, included the following averments:

4. Copies of your appellant's Petition for Writ of Certiorari to the United States Court of Appeals for the Th Circuit and Appendix filed in the Supreme Court of the United States at No. 663 October Term, 1959, in the matter of Paul Ginsburg, Petitioner, v. Hon. Wallace S. Gourley, have been lodged with this Honorable Court, and the same is incorporated herein by reference thereto. In said petition, the Statement of the Case (3-10) sets forth the crux of the instant motion. Therein reference is made (7) to Pennsylvania District Judge Marsh's Opinion dated June 11, 1954, pertaining to the Motion for Transfer, showing how deeply influenced the Judge was by the fraudulent misrepresentaiton about the financial condition of the minors and their mother—guardian ad litem; and that the inducing reason for the transfer was the convenience of the "three other witnesses", Mr. Rosenzweig, Mr. Overend and Mrs. Frantz.

5. In the Pennsylvania District Court it was fraudulently misrepresented that said "three other witnesses" at Phoenix could and would testify in support of the Complaint, which alleged an oral trust for the two

minor sons "at the time" when the decedent-insured in writing had voluntarily made your appellant (his brother) the absolute owner, sole beneficiary, premium payor and possessor of the insurance policies.

8. Your appellant knew that those misrepresentations were false when made, and that none of the appellee's "witnesses" could possibly produce any evidence to establish the alleged oral trust; however, he was not permitted by the Court and was unable at any rate to expose their fraud prior to trial. At the trial the extrinsic fraud was positively established; and, being a fraud of record, it is apparent.

10 On May 21, 1959, your appellant's Motion to Retransfer the Cause, based upon the fraud on the Court discovered at the trial, was presented below by his attorney, Hess Seaman, Esquire, of Beer, Seaman & Polley. On June 16, 1959, through said counsel, your appellant's Notice of Taking Depositions (on June 30, 1959) in support of the Motion to Retransfer the Cause was served and filed. On June 18, 1959, District Judge Ling summarily denied the Motion to Retransfer the Cause, in advance of the noticed depositions, without Hearing thereon, refusing to consider the issue of the record fraud. The following day, June 19, 1959, District Judge Ling entered Judgment (unaccompanied by an Opinion) for the interpleaded plaintiffs against your appellant, the interpleaded defendant, simply signing the insupportable and unsupported Findings of Fact and Conclusion of Law submitted for the interpleaded plaintiffs. Subsequent to the said final Judgment, to wit, on June 29, 1959, District Judge Ling entered an Order granting plaintiffs' motion that the depositions noticed for June 30, 1959, not be taken.

11. Just as the fraud which induced the Pennsylvania Court to transfer the cause to Arizona is a matter of record, so is the point that the final Judgment in the Arizona District was entered prematurely, denying due process of law in general and the right to be heard in advance of judgment in particular. This latter point is obvious, if only from the docket entries. That should leave this Honorable Court no legal alternative but to open up and vacate the said final Judgment and remand the cause for further proceedings.

13. The fraudulent transfer of this cause has deprived the appellant-interpleaded defendant of his right to defend in a Court of competent jurisdiction in which he resides. It is *res judicata* that the Arizona District Court was without jurisdiction because the original Phoenix Complaint at No. Civ. 1882 — Phx. which brought about the interpleader was ordered dismissed as to Paul Ginsburg by Judge Ling for lack of jurisdiction. Judge Ling's said Order Sunstaining Motion to Dismiss, "Done In Open Court the 31st day of March, 1958", concluded, "The Court therefore has no jurisdiction over his person".

14. Because transfer of the cause was procured through fraud, it is elementary that the transferor Pennsylvania Court never lost jurisdiction, the transferee Arizona Court never acquired jurisdiction, and this Honorable Court accordingly has no legal alternative but to order retransfer and remand to the Pennsylvania District for trial, all proceedings in the Arizona District being a nullity.

15. In the Supreme Court Petition at No. 663 October Term, 1959, referred to above and incorporated here-

in, there is adequate legal authority to support the propostion (11-12) that a fraud upon the Court was perpetrated; and that (12-14) the extrinsic fraud on the Court rendered the Order of Transfer void and all proceedings pursuant thereto a nullity.

G. *Prior* to this Honorable Court's denial of the unopposed Petition for Writ of Certiorari herein, it was apparent from the Record that the respondent refused to consider the instant issue of fraud because he thought he was without jurisdiction; and the Court of Appeals for the Third Circuit would not review that decision.

H. *Since* said denial of the unopposed petition for certiorari, it has become apparent from the Record that the transferee Arizona District Judge refused to consider the same issue of fraud without assigning any reason, and the Court of Appeals for the Ninth Circuit likewise refused to adjudicate the issue of fraud through its denial of petitioner's above mentioned Motion.

I. *Now* the issue of fraud presented herein to this Honorable Court finally is fully ripe for consideration, because every lower means of adjudication has been exhausted.

J. This Honorable Court has reiterated the pronouncement that in the District Courts a litigant is to receive his first chance to an adjudication, and in the Courts of Appeals he is to receive his second chance; however, it is not intended that in paying the filing fee to the Clerk, the litigant is purchasing a lottery ticket. The litigant is not to be taking chances, but to be receiving them.

K. It is obvious as a matter of record that your petitioner never had a chance. Neither of the District Courts, nor Courts of Appeals, adjudicated the highly important issue of fraud. It necessarily follows that this Honorable Court is not only your petitioner's Court of last resort, but also his Court of only resort.

L. In view of the foregoing, the fraud perpetrated upon all of the Courts involved herein should be cleansed by this Honorable Court.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner
Carlton House,
500 Grant Street,
Pittsburgh 19, Pa.

IN THE

Supreme Court of the United States

NO. 663 OCTOBER TERM, 1959

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, hereby makes the following amendment to his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

The entire Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and all of its contents shall remain as originally filed; and in addition thereto petitioner hereby adds to the Reasons Relied on For Allowance of the Writ (11-19) therein, in addition to Reasons I., II., III., and IV., the following Reason:

V.

Petitioner Has Exhausted All Procedural Steps Available in the Ninth Circuit As Well As the Third Circuit Without Receiving Any Consideration, Hearing or Adjudication on the Merits, Leaving to This Court the Adjudication of the Issue of Fraud.

It is finally a matter of record in this Honorable Court that none of the lower Courts would recognize, consider or cleanse the fraud perpetrated upon them and upon your petitioner; neither the District Courts of Arizona and Pennsylvania, nor the Courts of Appeals for the Ninth Circuit and the Third Circuit. Therefore, the above entitled cause is not only fully ripe for review by this Honorable Court, but also such review is required by the fair administration of justice in the Federal System. It is presently evident that this is not only the Court of last resort, but also patently your petitioner's Court of only resort.

To deny certiorari in the face of the supplemented and consummated record now before this Honorable Court would be tantamount to holding that fraudulent misrepresentations which induce Court Orders will be sanctioned, instead of frowned upon; and that "judicial" proceedings pursuant thereto are legal, instead of void.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner,
Carlton House,
550 Grant Street,
Pittsburgh 19, Pa.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 16 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

NO. 663 OCTOBER TERM, 1959

PAUL GINSBURG, Petitioner,

v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

MOTION FOR PRODUCTION OF RECORDS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

NO. 663 OCTOBER TERM, 1959

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v.

HON. WALLACE S. GOURLEY, Chief Judge, United States District Court for the Western District of Pennsylvania, Respondent.

MOTION FOR PRODUCTION OF RECORDS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully moves this Honorable Court to enter an Order directed against Hon. Frank H. Schmid, Clerk of the United States Court of Appeals for the Ninth Circuit, requiring and compelling him to produce and deliver to Hon. James R. Browning, Clerk of this Honorable Court, forthwith all of the records and documents on file in the Court of Appeals for the Ninth Circuit in appeal No. 16768 wherein your petitioner, Paul Ginsburg, is the appellant, and Bonn Kraus Ginsburg and John Paul Ginsburg, minors, by their Guardian ad litem, Betty K. Ginsburg, are the appellees, the said production and delivery to the Clerk of this Court being necessary for the use of this Court in the above entitled action; and in support hereof avers:

1. Pending before this Honorable Court in the above entitled action is petitioner's Motion to Vacate

Order Denying Certiorari and for Leave to Amend Petition for Writ of Certiorari, wherein references are made to records originally filed in the Third Circuit as well as in the Ninth Circuit, all of which are necessary to this Honorable Court's full consideration of the above entitled action.

2. All of the documents and records originally filed in both the Third and Ninth Circuits are now in the files of the Clerk of the Court of Appeals for the Ninth Circuit because the action originally instituted in the Western Pennsylvania District of the Third Circuit was transferred to the Arizona District of the Ninth Circuit.

3. On and after April 25, 1960, your movant made requests of the said Clerk of the Court of Appeals for the Ninth Circuit, as well as of the said Court, to produce and forward all of the records and documents on file in that Court in the aforementioned appeal to the Clerk of this Honorable Court for use in the above entitled action, but both the Clerk and the Court refused to do so.

4. In the interest of justice, and to enable this Honorable Court to have before it the entire record to secure full consideration of the merits of the above entitled cause, all of the said records and documents now in the Ninth Circuit should be on file in this Honorable Court, with the result that all of your petitioner's allegations and contentions herein will have full record support.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner